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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW R. GUTIERREZ, Defendant and Appellant.	A150976 (Alameda County Super. Ct. Nos. C177788, C177809)

Defendant Andrew R. Gutierrez appeals from judgment after a jury convicted him of rape of an unconscious person (Penal Code § 261(a)(4); count 1)[1] and rape of a person who is prevented from resisting by an intoxicating substance (§ 261(a)(3); count 2). Defendant asserts that testimony offered to impeach the individual he raped was improperly excluded, while testimony offered to impeach defendant was improperly allowed. He also makes claims of judicial misconduct and ineffective assistance of counsel. All of these claims fail.

Defendant was sentenced on both the rape convictions and on separate arson charges, to which he had pled no contest. Defendant raises a variety of sentencing issues and we order a limited remand to the sentencing court as detailed below. Other than as modified by the remand for sentencing purposes, the judgments in both cases are affirmed.

[1] Unless otherwise specified, all further statutory references are to the California Penal Code.

PROCEDURAL AND FACTUAL BACKGROUND

I. The Charged Offenses

This case arises from two informations filed against defendant in 2016 in Alameda County: (1) case No. 177788 charging the aforementioned rape counts (convicted on October 24, 2016 after jury trial); and (2) case No. 177809 charging three counts of arson of property (§ 451(d); counts 1, 4, 6) and three counts of arson of an inhabited structure of property (§ 451(b); counts 2, 3, 5.)[2] Counts 3 and 5 of the arson information allege defendant had caused multiple structures to burn (§ 451.1(a)(4).) On October 3, 2016, defendant pled no contest to the arson charges, admitted an excessive loss enhancement as to count 2, admitted the aggravating factor that he caused multiple structures to burn as to counts 3 and 5, and gave up his right to appeal. The plea did not provide for a specific, agreed-upon sentence. On March 10, 2017, the trial court sentenced defendant in both the arson and rape cases to 21 years 8 months in prison.

Defendant timely filed notices of appeal. Defendant does not challenge the validity of his plea of no contest to the arson charges but instead challenges certain sentencing aspects of both his arson and rape convictions. Defendant challenges his conviction after trial on the rape charges.

II. The Rape Trial

The rape trial took place in October 2016. The prosecution's case was based largely on A.H.'s[3] testimony and on defendant's police interview. Both painted the clear picture of defendant coming across a previously unknown and very intoxicated woman (A.H.) alone in a car, moving the car to an isolated and dark park, having sex with her, and then proceeding to lie during his police interview about having sex with her.

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[2] A third information filed against defendant in 2016 (case No. 177810 charging second degree auto burglary (§ 459) was dismissed by the trial court at the prosecutor's request.

[3] Pursuant to the California Rules of Court rule 8.90(b)(4), governing "Privacy in Opinions," we refer to the victim by her initials.

The defense case rested on the testimony of co-workers who saw A.H. flirting and "making out" with an unknown and unkempt man (not defendant) at a bar, defendant's trial testimony during which he admitted to having what he characterized as consensual sex with A.H., and expert testimony that A.H. was conscious and responsive during the incident but unable to form long-term memories due to an alcohol-induced blackout.

A. Prosecution Case – A.H.'s Testimony

A.H. testified, in pertinent part, as follows. A.H. attended a work party at an Oakland restaurant on September 19, 2014. She had two glasses of wine with some food and, after about two hours, left with coworkers to go to a bar across the street where she and the others had drinks. A.H. recalled speaking with a man at the bar; he bought her a drink but they only spoke and had no physical contact. A.H. left the restaurant after having consumed more alcohol than usual and, for reasons she could not recall, she headed to the restaurant's back exit although her car was parked out front. She was drunk when she left. The next thing A.H. could remember was driving and that she was "maybe kind of blacking out" and drunk. A.H. drove a Mercedes C class and could not recall starting the car. She could not drive for long and pulled over on the wrong side of the street toward oncoming traffic, unsuccessfully tried to open the passenger door (which had automatically locked), and vomited on herself inside the car.

A.H. woke up in the backseat with nothing on her lower half and with a man she did not know on top of her having sex with her, which caused her to be scared. She did not give her consent because she "wouldn't do that" and did not recall being able to exercise her judgment about what was occurring. Her car doors locked automatically when she started driving, no car windows were broken, and she did not know how defendant entered the car.

A.H. told defendant to stop and started to cry. Defendant stopped and asked, in Spanish, "Me vas a reportar," which she understood to mean something about reporting him. There was no sexual intercourse after she told him to stop. Defendant gave A.H. her pants and she wound up in the driver's seat (though she could not remember getting

into it) and drove defendant to a location she was later able to identify. Her clothing and the inside of her car were covered in vomit.

After defendant exited her car, A.H. felt panicked and unsure of where she was; she used her phone to search her location and to text her ex-boyfriend but then her phone died. Ultimately, and while still feeling intoxicated, she drove until she found a freeway and went home. While she was driving, her ex-boyfriend contacted the police.

A.H. later went to the hospital, underwent a rape examination, and spoke with Alameda County Police Officer Armando Zaragoza. She was unable to provide him with a clear description of the defendant. After she was done at the hospital, Officer Zaragoza drove her around to try to identify the location of the incident. Over the subsequent days, A.H. remembered that she had seen defendant drinking a beer as she drifted in and out of consciousness. She also found an unopened bottle of Corona in her car that did not belong to her.

B. Prosecution Case – Defendant's Police Interview

Alameda County Police Department Officer Michael Gardara, who is fluent in both Spanish and English, interviewed defendant in October 2014. Officer Gardara testified before the jury regarding the interview, including that defendant waived his *Miranda* rights. In addition, a recording of the interview was played for the jury and they were provided with a transcript of the recording.

During the police interview, defendant repeatedly denied having sex or any sexual contact with A.H. Defendant told the police that he came across A.H. parked illegally and leaning against the inside of the driver's side door; he knocked on the window to see if she was all right. A.H. opened the passenger side door and defendant entered. He offered to move the car since the police would arrest A.H. and take the car if they found out she had been driving in her condition. She put the car keys on the dash, went to the back seat, and vomited. Defendant took a sheet from the backseat, used it to cover the vomit on the driver's seat, and moved the car to a dark park. Defendant stayed with A.H. and they smoked cigarettes and spoke. She took him to his friend's home nearby and he had bottles of Corona beer with him to drink at his friend's house.

During the course of the interview, defendant changed his story and said he left A.H. in the car and went to his friend's house. As his friend was not home, he returned to the car and smoked a couple of cigarettes in the front seat while A.H. slept in back. She then awoke and offered to take him home.

In another version given by defendant during the interview, he went to the back seat but A.H. would not wake up. He went to his friend's home and came back, and smoked a cigarette outside the car before getting in the back seat. A.H. awoke, he told her his name, and they spoke until she drove him to his friend's home and they parted ways.

In sum, defendant's account to law enforcement in large part aligned with A.H.'s account of events with the key differences that he denied any sexual contact and was inconsistent regarding a variety of details.

While defendant's identity was clearly not controverted, additional testimony was provided by Alameda County Police Department personnel regarding his identity. A crime scene specialist testified that two prints lifted from A.H.'s car's right rear passenger door handle were identified as belonging to defendant's right and left thumbs. A sergeant testified that A.H. identified defendant in a double-blind photo lineup.

C. Defense Case – Co-Worker Testimony

A.H.'s coworker (co-worker #1) testified that he recalled A.H. flirting with a man at the bar and that she touched the man and twirled or touched his hair. Co-worker #1 stated that A.H. appeared happy and had been drinking.

Another co-worker (co-worker #2) who attended the work party testified that about six of them, including A.H., went to the bar across the street from the restaurant to continue drinking. Co-worker #2 testified that she sat a few bar stools away from A.H. and saw her drinking. She also saw A.H. "French kissing" an unknown "random man" at the bar. The man looked "unclean" and was "not well put together." Co-worker #2 left the bar before A.H.; when she left A.H. appeared to be functioning and behaving normally.

The unknown man at the bar was a different individual, not defendant.

D. Defense Case – Defendant's Testimony

Defendant testified at trial as follows. On the night of the incident, defendant was on his way to his friend's house when he saw A.H.'s car parked incorrectly on a busy street; she was leaning on the inside of her car door and appeared unwell. He knocked on the window and she unlocked the door. They communicated in Spanish once A.H. understood that he did not speak English. A.H. said she was not feeling well, he got into the front passenger seat, and she threw up by the driver's door.

A.H. agreed defendant should move the car so she put the key in the center console, walked normally to the back, and got into the backseat. Defendant protected himself from the vomit on the driver's seat and door with a sheet from the back seat. He drove to a dark park, where A.H. said she felt better. Defendant only knew A.H.'s name because he found her business card (with her name on it) in the car. A.H. opened the car door and vomited outside. He knew A.H. should not be driving but she did not look that drunk and he did not see her pass out. A.H. said she was feeling better, he left to go to his friend's house two streets away, but his friend was not home so he returned to the car. He found A.H. sitting; she said she was fine and looked fine. They sat in the backseat and spoke while he drank a few beers. He then stepped out to smoke a cigarette before getting back in the car.

A.H. moved closer to him and put a hand between his legs, they touched, she unbuttoned and removed her own pants, and about two minutes later they were having sex but did not kiss. Defendant believed A.H. knew what she was doing because of her conduct, and because she verbally consented to sex. Nothing she did caused defendant to believe that A.H. did not know what she was doing.

At some point A.H. told him to stop; he did so and asked why, to which she replied that she was not the "type of person" to be doing this. She pulled on her pants, they moved into the front seats during which she walked "fine," and she drove him to his friend's house where they parted ways. Defendant did not tell anyone about what happened because he did not like "to talk about that." He had no reason to believe she would go to the police and he did not ask her not to report him.

Defendant testified about why he lied during his police interview. He stated that he understood his rights and spoke voluntarily but did not tell the full truth because he did not have a lawyer present. He also lied because A.H. had changed her story in that she was saying that she did not consent. He admitted that he could have told the police that the sex was consensual, but he did not know what was going to happen and it "was the first time I was being investigated for something." Defendant subsequently admitted this was not true as two weeks prior to this police interview he had been arrested for and interviewed regarding arson, for which he was later convicted.

Defendant was asked "If you told the police that at one point you tried to wake her up and she wouldn't wake up, would that have been a lie" and he responded that he could not recall what he told the police. The court clarified that the question was not what he told the police but whether saying that would have been a lie and defendant answered "Maybe."

E. Defense Case – Expert Testimony

Dr. Douglas Tucker testified as an expert in general psychiatry, forensic psychiatry, and addiction medicine. Based on his review of the charging documents, police reports, police interview, and summaries of the co-workers' and defendant's testimony, he opined that A.H. was conscious at the time of the incident but unable to form long-term memories due to her alcohol consumption. This state of consciousness without subsequent recall is referred to in common parlance as a "blackout." In this state, one knows what is happening and is able to make decisions but has no, or only fragmented, memories. To an observer, a person having a blackout appears disinhibited but otherwise fairly normal and able to make decisions. This is different from being unconscious, comatose, or passing out. The commonality between a blackout and losing consciousness is that, in both cases, the person has no memory of what occurred.

Dr. Tucker based his opinion on three main factors: (1) A.H. behaving sexually with the unknown man at the restaurant, which she did not recall, showed both her inability to form long-term memories and her typical behavior while intoxicated; (2) A.H. driving away from the restaurant without any memory of turning on the ignition or

driving away showed that she was in a blackout state unable to form long-term memories; and (3) A.H. having no memory of letting defendant into the car although the car door locked when the engine was turned on and stayed locked when the engine was turned off. Dr. Tucker did not interview defendant. Dr. Tucker testified that "French kissing" with a stranger at the bar was very strong evidence of a blackout and also showed that A.H. becomes sexual when she gets intoxicated.

Dr. Tucker agreed that, given the circumstances, A.H. was most likely very intoxicated. Not everyone blacks out and gets amnesia from alcohol, but some people are more vulnerable to this occurrence. People with a history of blackouts are more vulnerable to them and their behavior during blackouts has consistent patterns.

Dr. Tucker did not believe that A.H. lied about "waking up" in the backseat with defendant atop her but that, in reality, she was not waking up but instead regaining her ability to start recalling as she went in and out of an alcohol induced state of fragmentary or partial blackouts.

DISCUSSION

I. THE TRIAL COURT'S EXCLUSION OF THE 2011 INCIDENT WAS WITHIN ITS DISCRETION

The defense filed a "Motion in Limine Under Seal Pursuant to Evidence Code 782" to admit two incidents: (1) an incident in 2011 **[REDACTED]** (the 2011 incident);[4] and (2) A.H.'s conduct at the bar on the night in question, specifically her "making out" with an unknown man. The court granted the motion as to A.H.'s conduct at the bar earlier that same night but denied the

[4] Pursuant to order of the trial court, documents pertaining to the 2011 incident were filed with the trial court under seal. In accordance with the Rules of Court, the sealed documents were filed under seal in this court and the parties filed both sealed unredacted and public redacted versions of their briefs. (See Cal. Rules of Court, rule 8.46(f).) We have filed both a redacted and sealed opinion, redacting portions of the publicly available opinion where necessary to protect information under seal not already in the public domain. (See Cal. Rules of Court, rule 8.46(g).)

motion as to the 2011 incident and excluded all evidence regarding or based on the 2011 incident. Defendant contends that the trial court abused its discretion by excluding evidence of the 2011 incident.

A. The 2011 Incident

[

[5]

REDACTED

[5] **[REDACTED]**

]

B. The Trial Court's Rulings

Defense counsel sought to admit the 2011 incident under Evidence Code section 782 (section 782), **[**

REDACTED

] The motion was denied. On appeal, defendant concedes that section 782 does not apply to the 2011 incident.

[

REDACTED

]

C. It Was Within the Trial Court's Discretion to Exclude the 2011 Incident

We must not disturb the trial court's discretion regarding admissibility " '*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]' [Citation]" and it is the appellant's burden to prove an abuse of discretion. (*People v. Rodrigue*s (1994) 8 Cal.4th 1060, 1124–1125 (*Rodrigues*).) The appellant must show more than facts which support a difference of opinion as an " 'appellate tribunal is not authorized to substitute its judgment for that of the trial judge.' " (*People v. Henderson* (1986) 187 Cal.App.3d 1263, 1268.) Here, it was within the trial court's discretion to exclude the 2011 incident based on its findings that: (1) it was irrelevant; and (2) any potential relevance was outweighed by potential confusion and prejudice under section 352.

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) " 'While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury.' [Citation]." (*People v. Freeman* (1994) 8 Cal.4th 450, 491.)

[

REDACTED

]

Applying defendant's own test, it fails. **[**

REDACTED

[6]

] Therefore, the trial court exercised appropriate discretion in excluding the 2011 incident as not relevant.

Even if the 2011 incident had some relevance, the trial court was well within its discretion in concluding that any limited probative value was outweighed "by the probability that its admission will . . . create a substantial danger of undue prejudice,

[6] **[REDACTED]**

confusing the issues, or of misleading the jury." (Evid. Code § 352; see *People v. Contreras* (2013) 58 Cal.4th 123, 152 (*Contreras*) [trial court's exclusion of collateral impeachment testimony "necessarily encompasses a determination that the probative value of such evidence is 'substantially outweighed' by its prejudicial, 'confusing,' or time-consuming nature."]) Exclusion of evidence pursuant to section 352 is reviewed under an abuse of discretion standard. (*People v. Holloway* (2004) 33 Cal.4th 96, 134.)

The trial court found that "whatever probative value, if any, [the 2011 incident] has, it is completely excluded because it is going to confuse the issues, mislead the jury about what the real issue is, which is what happened the might [sic] of this incident in 2014, and not in 2011, and it is not even under circumstances that we know what actually occurred in 2011." The trial court also concluded that the 2011 incident was "highly prejudicial under 352 . . . ."

The trial court's conclusion that the admission of the 2011 incident would be both confusing and misleading, as well as prejudicial, under section 352 was not "arbitrary, capricious or patently absurd." (*Rodrigue*s, *supra*, 8 Cal.4th at p. 1124.) **[**

REDACTED

]

Defendant's own arguments illustrate how admission of the 2011 incident could confuse the issues and mislead the jury. **[**

REDACTED

] Therefore, the trial court appropriately exercised its discretion in finding that any limited probative value of the 2011 incident was outweighed by the likelihood that it would confuse, mislead, or prejudice the jury.

D. Exclusion of the 2011 Incident Did Not Violate Defendant's Constitutional Rights or Otherwise Render his Trial Fundamentally Unfair

Even if exclusion of the 2011 incident were erroneous, such error was not so serious as to violate defendant's constitutional rights, or otherwise render his trial fundamentally unfair. (See, e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) As the California Supreme Court explained, as long as the excluded evidence would not have produced a ' " 'significantly different impression of the [witness's] credibility' " ' the confrontation clause and related constitutional guarantees do not limit the trial court's discretion in this regard. (*People v. Harris* (2008) 43 Cal.4th 1269, 1292 [trial court retains wide latitude in restricting cross-examination that is prejudicial or confusing of the issues].)

There is no real danger that exclusion of the 2011 incident had any major impact. In fact, the trial court allowed evidence that was significantly more relevant and probative – evidence that, the very same night, A.H. had engaged in consensual sexual contact with an unknown (and unkempt) individual in a public space and thereafter had no recollection of what she did, apparently due to her alcohol consumption. **[**

REDACTED

] " 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that

it violated federal due process." [Citation.]' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229–230 (*Albarran*).) It did not.

II. DEFENDANT OPENED THE DOOR TO IMPEACHMENT BASED UPON HIS ARSON ARREST, POLICE INTERVIEW, AND CONVICTION

A. Background

Defendant pled no contest to the arson charges prior to the rape trial. Defense counsel filed a motion in limine to limit the use of the arson convictions as impeachment of defendant in the rape trial to simply using the term "felony," or, alternatively, "if the court decides that it is not sufficient, then the prosecution should only be permitted to use only one of the six convictions." The trial court ruled that impeachment would be permitted by only one prior felony conviction, and that it would be sanitized by being referred to as "a felony crime with moral turpitude conviction on October 3, 2016, in Alameda County" without reference to it being arson. (See *People v. Miles* (1985) 172 Cal.App.3d 474, 481–482 [arson is a crime of moral turpitude].)

Defendant was asked the following question during cross-examination: "you could have told [the police interviewing him regarding the rape charges] that you had permissible or consensual sex with [A.H.], correct?" Defendant responded, "Yes. Well, I could have told them, but I didn't know what was going to happen. It was the first time I was being investigated for something." Faced with testimony it knew to be untrue, the trial court immediately called for a recess. With the jury adjourned, the prosecutor argued that defendant has "now tried to enhance his own credibility by saying this is the first time that he's been investigated for something," and thus he has "open[ed] the door" to being cross-examined about the arson convictions. The prosecutor asked to impeach defendant on the basis that he had shortly before the interview in question been arrested and interviewed by law enforcement in regards to the arson case to which he then pled guilty. Defense counsel argued that any impeachment should be limited to whether defendant had been investigated before "without mentioning what it is for because that isn't relevant to his response." This argument constituted a formal objection. (See

People v. Morris (1991) 53 Cal.3d 152, 188, disapproved on another ground in *People v. Stansbury*, 9 Cal.4th 824, 830 fn. 1.)

Citing to Evidence Code 780(i), the trial court found "the defendant, by his statement that '[t]his was the first time I was being investigated for something,' . . . . opened the door for questioning about the details and the surrounding circumstances of his prior crime." (See Evid. Code § 780, subd. (i) [jury may consider any matter that has any tendency in reason to prove or disprove the existence or nonexistence of any fact testified to by a witness].) Defense counsel asked that he be permitted to ask defendant what he meant by "[i]t was the first time I was being investigated *for something*" in his testimony, and that he be allowed to voir dire defendant on the issue of the previous arrest. These requests were rejected.

The trial court allowed the prosecutor to question defendant about his arson arrest and interview, that he was under investigation for one arson crime (not six), and his guilty plea. The following testimony was elicited from defendant on cross-examination: he had previously testified that he lied to the police because he had not been investigated before; that testimony was a lie; he had been arrested and interviewed by the Alameda police department on October 14, 2014, before being interviewed in the rape case; the arrest and interview were in regards to the crime of arson; and he pled guilty to one count of arson.

B. The Trial Court Did Not Abuse its Discretion in Allowing the Impeachment Evidence

A trial court has broad discretion to allow impeachment evidence. (*People v. Clark* (2011) 52 Cal.4th 856, 932; see also *People v. Collins* (1986) 42 Cal.3d 378, 389 [the discretion to admit or exclude prior convictions for impeachment purposes "is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded"].) The trial court's ruling regarding impeachment evidence " 'must not be disturbed on appeal *except* on showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner . . . .' " (*Rodrigues*,

supra, 8 Cal.4th at pp. 1124–1125 (italics in original); see *Albarran*, *supra*, 149 Cal.App.4th at pp. 224–225.)

Here, it was well within the trial court's discretion to allow the prosecutor to question defendant about his previous arson arrest, interview, and conviction because defendant lied as to whether he had previously been investigated, apparently intending to mislead the jury and provide a rationale for why he had lied to law enforcement in the context of the rape investigation. (See *People v. Beagle* (1972) 6 Cal.3d 441, 453, abrogated on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176 ["[n]o witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity"].)

Defendant relies on *Steele* for the proposition that "a party should not be allowed to take advantage of an obvious mistake [defendant's testimony] to introduce prejudicial evidence." (*People v. Steele* (2002) 27 Cal.4th 1230, 1248.) Nothing in *Steele* mandates reversal. Not only does defendant not appear to have made any mistake, but the *Steele* opinion emphasizes that once the defense initiates a line of testimony the prosecutor is entitled to "present the full picture." (*Id*. at p. 1247.) Defendants' reliance on *Epps* is also misplaced as, in that case, defendant only made a specific denial (that he had not kissed the victim) as opposed to a general denial (that he had never kissed a minor). (*People v. Epps* (1981) 122 Cal.App.3d 691, 696–697.) In the instant case, defendant denied having ever been previously investigated for anything and made this denial in an attempt to justify lying to law enforcement.

Further, any error was harmless as the impeachment evidence was not unduly prejudicial. "[T]he test for prejudice under Evidence Code section 352 is not whether the evidence in question undermines the defense or helps demonstrate guilt, but is whether the evidence inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145.) We first note that the trial court limited the impeached questioning to one – rather than six – arson convictions. (*People v. Castro* (1985) 38 Cal.3d 301, 317 [trial court has

discretion to exclude evidence under Evidence Code section 352 as more prejudicial than probative].) Further, the trial court recognized that allowing the prosecutor to refer to the conviction as being for arson rather than for "a felony crime with moral turpitude" would remove potential speculation by the jury, possibly to defendant's detriment, about the nature of the crime. We are not persuaded that the impeachment allowed by the trial court would so outrage the jury that they would convict defendant on rape charges because of an unrelated arson conviction, especially where they were clearly instructed that if it found "a witness has been convicted of a felony, [it] may consider that fact only in evaluating the credibility of the witness's testimony."

We also note that the jury had ample basis to disbelieve defendant aside from the lie regarding whether or not he had been previously investigated. Defendant gave a variety of reasons as to why he lied to law enforcement, including that he had lied to law enforcement about having sex with A.H. despite speaking with them voluntarily and having been told his *Miranda* rights. He also testified that he lied because he did not have a lawyer and because A.H. told him yes but then denied consenting to sex. There were many inconsistencies between what he told the police during the interview and compounding inconsistencies between what he told the police and what his trial testimony provided. Finally, closing argument also emphasized that the arson conviction and defendant's false testimony about not having previously been investigated were only to be considered by the jury as to defendant's credibility.

Finally, defendant's claim that the error was prejudicial because the arson case was highly publicized is waived as it was not raised in the trial court. (Evid. Code § 353; see *People v. Rogers* (1978) 21 Cal.3d 542, 548 [stating "general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of specific and timely objection in the trial court on the ground sought to be urged on appeal"].) We also note there is zero evidence that the jurors had read any article about the arsons or that defendant was connected during the trial to the publicized arsons.

Thus, it was well within the discretion of the trial court to allow the prosecutor to question defendant about his previous arson arrest, interview, and conviction.

III. THERE WAS NO JUDICIAL MISCONDUCT

Defendant stakes his claims of judicial misconduct on the argument that the misconduct was so pervasive that he was denied due process, his constitutional rights to an impartial and unbiased judge, the right to present a defense, the right to effective assistance of counsel, and the right to a reliable verdict. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1111 (*Guerra*), disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151 [a defendant has a due process right to an impartial trial judge and the due process clause of the Fourteenth Amendment requires a fair trial before a judge with no actual bias against the defendant or interest in the outcome of the case].) We reject defendant's judicial misconduct claims both because they were not properly preserved and on the merits.

A. The Judicial Misconduct Claims Are Waived

Defendant claims that the trial court "treated defense counsel unfairly"; improperly examined Dr. Tucker and the defendant; improperly excused a prospective juror; overruled defense objections; and limited cross-examination and the presentation of defense evidence. All of these issues have been waived as none of them were objected to in the trial court. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1320 ["As a general rule, a specific and timely objection to judicial misconduct is required to preserve the claim for appellate review"].)

Defendant contends that there is no waiver because objecting at trial would have been futile. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237 (*Sturm*) [failure to object does not preclude review when an objection and subsequent admonition would not cure the prejudice caused by such misconduct, or when objecting would be futile].) We are not persuaded as defendant's sole support in the record is on one comment by defense counsel early in the trial that he "knew better" than to "squabble" with the trial court. This comment followed the trial court's rulings on the scope of expert testimony and the jury questionnaire, during which counsel stated that he was "just overwhelmed, so I can't think any more [sic]." While defense counsel's statement that he "knew better" than to "squabble" with the court may indicate that he did not think it would be productive to

reargue the court's immediate rulings, it in no way reflected that all potential objections would be futile.

Further, defendant's "willingness to let the entire trial pass without . . . charge of bias against the judge not only forfeits his claims on appeal but also strongly suggests they are without merit." (*Guerra, supra*, 37 Cal.4th at p. 1112.) Here, defense counsel not only failed to raise a concern about judicial misconduct but, in closing argument, stated he "very seldom have [sic] participated in a trial where the court staff, judge, counsel have such a magnanimous rapport . . . . The Court has provided me with every opportunity to argue every legal point, and I appreciate that."

Thus, we conclude that defendant has forfeited any claim of judicial misconduct by failing to object at trial.

B. The Judicial Misconduct Claims are Without Merit

Even if defendant had properly preserved his claims of judicial misconduct, they would be rejected. It is not our role to determine " 'whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [defendant] a fair, as opposed to a perfect, trial.' " (*People v. Blacksher* (2011) 52 Cal.4th 769, 824.) "A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel . . . . and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense . . . .' " (*People v. Fudge* (1994) 7 Cal.4th 1075, 1107.)

Defendant cites numerous instances of alleged judicial misconduct. We have grouped a representative sample of the instances according to the type of behavior criticized by defendant.

Defendant contends the trial court improperly limited the admission of "critical evidence." In support of this argument, defendant points to the trial court's decision to preclude the expert witness from testifying about the 2011 incident. As explained in Section I of the Discussion, the trial court's exclusion of the 2011 incident was within its

discretion. (See *Sturm, supra,* 37 Cal.4th at p. 1237 ("[t]he trial court has a statutory duty to control trial proceedings, including the introduction and exclusion of evidence.") Even if the ruling were erroneous, it would not demonstrate bias or misconduct on the part of the trial court. (See *Samuels, supra,* 36 Cal.4th at p. 115 [even an erroneous evidentiary ruling does not demonstrate trial court bias].)

Defendant complains that the trial court improperly limited cross examination. For example, the trial court precluded the defense from recalling A.H. to cross-examine her about conduct with a man at the bar on the night of the incident. The trial court explained that defense counsel had already been given the opportunity to question A.H. about this conduct, that recalling her would "necessitate [an] undue consumption of time," and that the line of questioning could have possibly confused and misled the jury. Similarly, the trial court limited cross-examination on A.H.'s past alcohol consumption based on its determination that the information was not relevant. These decisions to limit cross-examination do not demonstrate an abuse of discretion by the trial court, nor do they support defendant's claim of judicial misconduct. Rather, they reflect the trial court fulfilling its duty under section 1044 to control proceedings, limit the introduction of evidence to proper matters, and provide a forum for an expeditious and effective determination of the truth. (See *People v. Cox* (1991) 53 Cal.3d 618, 700, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, ["[a] trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice"].)

Defendant also points to the trial court's allegedly improper questioning of the expert witness and defendant. First, defendant contends the trial court sent "a clear message to the jury that it distrusted the defense case and was allying itself with the prosecution" by posing questions to the expert witness. The trial court asked the expert witness six questions regarding his background and qualifications and three clarifying questions regarding his testimony on the locking mechanism in A.H.'s car. In this limited questioning, the trial court did not comment on the evidence, nor make any negative remarks. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1305 ["trial judge

may examine witnesses to elicit or clarify testimony" but should not " 'under the guide [sic] of examining witnesses comment on the evidence or cast aspersions or ridicule on a witness.' [Citation]"]); see also *People v. Pierce* (1970) 11 Cal.App.3d 313, 321 ["[t]he mere fact that a judge examines a witness at some length does not establish misconduct . . . ."].) Defendant also contends that the trial court's questioning of defendant was inappropriate, citing two examples. In the first, the trial court asked defendant two clarifying questions about a diagram of the route he took to resolve a possible ambiguity. In the second, the trial court asked a limited number of questions to clarify testimony about his consumption of beer on the night of the incident, his use of marijuana that day, and when he went to his friend's house. These instances of questioning by the trial court fall far short of demonstrating judicial misconduct. (See *People v. Raviart* (2001) 93 Cal.App.4th 258, 272 [a judge " 'does not become an advocate merely by asking questions.' [Citation.] "].)

Defendant avers that the trial court acted as an advocate for the prosecution. The bulk of the instances cited by defendant in support of this claim are the trial court simply ruling in the prosecution's favor. For example, defendant contends that the "*court advocated* against calling [A.H.] back to testify" about whether she recalled consenting to having sex with defendant. (Italics in original.) However, the trial court was simply explaining the basis for its ruling that defendant already had the opportunity to question A.H. and that it would not call her back to testify again. We note that this exchange took place when the jury was not present. Defendant also contends that the court expanded the scope of the impeachment based on his prior convictions "*beyond what the prosecutor had requested, on its own motion*." (Italics in original.) However, this misstates the record. The trial court and counsel had numerous exchanges regarding the proper scope of the impeachment evidence related to defendant's prior convictions. After asking both parties to present their positions on this issue, the trial court issued a ruling, which was narrower than one of the prosecution's original requests. This ruling and argument again took place outside of the presence of the jury.

Defendant also contends the trial court demonstrated bias by deliberately highlighting evidence to Juror No. 7 during a discussion in chambers in order "to assure his removal from the jury." Juror No. 7 was brought into chambers, along with counsel, because he wrote a note to the court expressing that he felt rushed to reach a verdict and had difficulty understanding the audio recording of defendant's police interview. The trial court explained that any timing predictions regarding the length of trial did not apply to deliberations and were "never intended to make [the juror] feel rushed" in reaching any decisions. As to the audio recording, the trial court assured Juror No. 7 that the jury would be given a copy of the transcript. Juror No. 7 then stated that the predictions about when the trial might end made him "feel like there was a rush to judgment . . . . I just didn't feel good about that." The trial court responded that he should not "prejudge any of the evidence" and explained that "whatever [the attorney] says is not evidence, what the witnesses say, that's evidence." Juror No. 7 confirmed that he believed he could be fair and open-minded to both sides. However, he also stated that he had questions about the pretrial process and pretrial interactions with witnesses. The trial court explained that the law allows for jurors to consider information obtained by each side through discovery, but that he should consider what the witness says and whether the witness was credible. The trial court noted that Juror No. 7 had provided a juror question during trial regarding whether the prosecutor had told A.H. what to say, and described the prosecutor's follow up questions to A.H. The trial court recounted A.H.'s answers and emphasized the importance of considering her testimony as a witness: "[A.H.] said, I am saying it because that is my truth. [¶] That's what she said. And what does that mean? That means that is what I remember and what happened. [¶] That is her testimony. What she says is important." Defense counsel moved for mistrial based on the court citing to evidence out of the presence of other jurors, but clarified that he was "not attributing any malice or negative activity by the [c]ourt." The trial court did not declare a mistrial, but offered that as a remedy it would excuse Juror No. 7. The prosecutor agreed, and defendant does not allege that the trial court erred in dismissing the juror. No reasonable

interpretation of these events could demonstrate an effort by the trial court "to assure [Juror No. 7's] removal from the jury" as defendant contends.

Finally, defendant claims that the trial court "treated defense counsel unfairly, giving the jury the impression that it was allied with the prosecution, or that the defense was inept or unworthy of belief." A form of judicial misconduct occurs when a trial judge " 'persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense.' " (*Sturm*, *supra*, 37 Cal.4th at p. 1233.) The record reflects no such misconduct here. The trial court's questions, comments, and actions were measured and in no way reflect unfair treatment of defense counsel. Defendant contends that the trial court made a number of " 'speaking rulings' " in front of the jury that "belittled counsel." A review of the record does not reveal any instances where the trial judge's comments were hostile or belittling. Defendant also argues that the trial judge treated defense counsel unfairly by calling counsel into chambers. However, in each instance of the court calling parties into chambers, there were legal issues raised by both the prosecution and defense that required extended discussion and were appropriate to conduct in chambers rather than before the jury.

In conclusion, we note that the trial court instructed the jurors before opening statements, after closing arguments, and in the written jury instructions not to take the court's questioning of witnesses, or any other actions by the court, as any sort of indication of a position taken by the court for either side. (*People v. Cook* (2006) 39 Cal.4th 566, 598 ["instruction reminded the jury of the trial judge's role as an impartial presiding officer whose occasional questions to witnesses were designed to clarify the evidence without favoring either side. [Citation]").]

Therefore, we hold that even if defendant had not forfeited his claims of judicial misconduct by failing to object, the trial court committed no acts of judicial misconduct.

C. Claim of Cumulative Prejudice

Defendant argues that the sum total of the trial court's errors resulted in prejudice. However, we do not find error in the trial court's actions and therefore there is no error to accumulate. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1235–1236 [" '[w]e have either

rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any assumed errors.' "])

IV. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL

As set forth immediately above, defendant contends the trial court denied him due process through "pervasive judicial misconduct that rendered [his] trial fundamentally unfair." Defendant makes this argument based upon the trial court's rulings, its questioning of Dr. Tucker and defendant, the excusing of a prospective juror, and interactions with defense counsel. Defendant contends that defense counsel's failure to object to all of the enumerated alleged misconduct forms a basis of his claim of ineffective assistance of counsel. Defendant also contends that his counsel should have objected to the evidence concerning his prior arson arrest although, in fact, his counsel did so.

To prevail on a claim of ineffective assistance, a defendant must show deficient performance and that, but for such deficiency, a reasonable probability exists that the result would have been more favorable. (*In re Jackson* (1992) 3 Cal.4th 578, 601, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th, 535, 545, fn. 6.) "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.' [Citation.] A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. [Citation.] The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' [Citation.]" *(Harrington v. Richter* (2011) 562 U.S. 86, 104 (*Harrington*).) Scrutiny of counsel's actions must be highly deferential, and the reviewing court must make every effort to remove "the distorting effects of hindsight." (*Strickland v. Washington* (1984) 466 U.S. 668, 689 (*Strickland*).) On appeal, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance

and made all significant decisions in the exercise of reasonable professional judgment." (*Id*. at p. 690.)

Defendant fails to demonstrate that defense counsel's representation "fell below an objective standard of reasonableness." (*Harrington*, *supra*, 562 U.S. at p. 104.) First, as explained in Section III, the record does not reflect a trial court that was biased or conducted an unfair trial. We therefore reject defendant's contention that he was denied effective assistance of counsel for failure to object to alleged judicial misconduct as the failure to object on non-meritorious grounds does not constitute deficient performance. (*People v. Lucero* (2000) 23 Cal.4th 692, 732 [" 'counsel may not be deemed incompetent for failure to make meritless objections.' "].) We also note the defendant provides minimal analysis of the ineffective assistance claims based on failure to object to alleged judicial misconduct. (See *Dills v. Redwood Associates, Ltd*. (1994) 28 Cal.App.4th 888, 890, fn.1 [appellate court "will not develop the appellants' arguments for them . . . . "].)

Next, defendant contends that defense counsel should have placed a "formal objection on the record" regarding the impeachment evidence (arson arrest, interview, and conviction) discussed in Section II. This argument fails as defense counsel vigorously advocated for limiting the impeachment evidence and argued that any impeachment should be limited to whether defendant had been investigated before "without mentioning what it is for because that isn't relevant to [defendant's] response." (See *People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on another ground in *People v. Stansbury*, 9 Cal.4th 824, 830, fn. 1 ["Evidence Code section 353 [erroneous admission of evidence] does not exalt form over substance. No particular form of objection or motion is required; it is sufficient that the presentation contain a request to exclude specific evidence on the specific legal ground urged on appeal"].) Similarly, defendant's contention that counsel should have requested an instruction that the jury limit its "consideration of the arson evidence to impeachment only, and not use the evidence as substantive evidence of guilt or propensity evidence" is without merit. The jury was instructed that if it found "a witness has been convicted of a felony, [it] may

consider that fact only in evaluating the credibility of the witness's testimony," and that "[d]uring the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." Defense counsel's decision not to request a duplicative limiting instruction falls far short of rising to the level of an error "so serious that counsel was not functioning as the 'counsel' guaranteed defendant by the defendant by the Sixth Amendment. [Citation]." *(Harrington*, *supra*, 562 U.S. at p. 104; see *People v. Hinton* (2006) 37 Cal.4th 839, 878 [failure to request limiting instruction is not ineffective assistance because "the instructions given were adequate to guide the jury's use of the prior conviction" and "counsel may have deemed it unwise to call further attention to it"].)

The law is clear that "a criminal defendant is entitled to a fair trial, not a perfect one." (*People v. Sixto* (1993) 17 Cal.App.4th 374, 393.) Defendant's claims of ineffective assistance of counsel are rejected given the lack of any reasonable probability that he would have achieved a more favorable result had his trial attorney objected to the alleged judicial misconduct or impeachment evidence.

V. SENTENCING

Defendant was sentenced in both the arson (No. 177809) and rape (No. 177788) cases on March 10, 2017. Probation was denied.

In the arson case, defendant was sentenced to serve a determinate term of 20 years in state prison, comprised of the upper term of eight years on count 3 (the principal count for both cases), one year and eight months (one-third the midterm) on counts 2 and 5, eight months (one-third the midterm) on counts 1, 4, and 5, plus the upper term of five years for the multiple structure enhancement, and four months for the excessive value enhancement. Defendant received pre-sentence custody credit for 895 days of actual time in custody, plus 134 days of conduct credit (§ 2933.1), for a total of 1,029 days credit. He was further ordered to pay a $10,000 restitution fine (§ 1202.4, subd. (b)), and a corresponding parole revocation fine (§ 1202.45), suspended, unless parole is revoked; a $240 court operations assessment (§ 1465.8); a $180 criminal conviction assessment

(Gov. Code, § 70373); a $250 probation investigation fee (§ 1203.1b); and victim restitution in the amount of $29,805.04.

In the rape case, defendant was sentenced to serve a determinate term of one year and eight months (one-third the midterm) on count 1, consecutive to the sentence imposed in the arson case. The sentence on count 2 was stayed under section 654. Defendant was ordered to pay a $1,999.80 restitution fine (§ 1202.4, subd. (b)), and a corresponding parole revocation fine (§ 1202.45), suspended, unless parole is revoked; a $80 court operations assessment (§ 1465.8); a $60 criminal conviction assessment (Gov. Code § 70373); a $500 sex offender fine (§ 290.3); and victim restitution in the amount of $1,049.45. No pre-sentence custody credits were applied as defendant was already in custody on the arson charges.

A. Defendant is Not Entitled to a Franklin Remand

Defendant was 22 years old at the time of the offenses. He asserts that he has the right to a youth offender parole hearing once he has served 15 years of his sentence under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), and is entitled to remand as he had insufficient opportunity to make that record during the sentencing hearing.

We agree that defendant will be eligible for a youth offender parole hearing. Former section 3051, in effect at the time of the sentencing in this case, mandated a parole hearing after 15 years for offenders under 23 years of age in circumstances applicable to this case. (Former § 3051, subds. (a)(1)(b), (b)(1); Stats. 2015, ch. 471, § 1.) In *Franklin*, the California Supreme Court held that the teenage defendant sentenced prior to the enactment of section 3051 was entitled to present evidence in the trial court relating to his eventual youth offender parole hearing if he did not previously have sufficient opportunity to do so. (*Franklin, supra*, 63 Cal.4th at pp. 283–284.)

Similar to the defendant in *People v. Woods* (2018) 19 Cal.App.5th 1080, 1088–1089, the defendant in this case was over the age of 18. Therefore, he was entitled to a youth offender parole hearing because the California Legislature decided, effective January 1, 2016, that such hearings should be afforded to any prisoner who was under age 25 at the time of the underlying offense. (*Ibid.*) Since defendant was sentenced well

after the enactment of section 3051, he "had both the opportunity and incentive to put information on the record related to a future youth offender parole hearing." (*Woods, supra*, 19 Cal.App.5th at p. 1089.) Unlike the defendant in *Woods*, who was sentenced prior to the *Franklin* decision, the defendant in this case was sentenced after the *Franklin* decision and therefore was even better positioned to put such information on the record.

The court in *Woods* denied the request for a *Franklin* remand because there was an eleven page probation report and the trial court clearly gave counsel the opportunity, which was declined, to supplement the report despite the fact that the report did not include any statements or letters from defendant or his family. (*Woods*, *supra*, 19 Cal.App.5th at pp. 1088–1089.) In the case before us, the trial court reviewed the arson case and rape case probation reports, which included detailed information regarding defendant's family, upbringing, education, employment, physical and mental health, and substance abuse issues. The trial court also reviewed defense counsel's sentencing memorandum, which discussed his need for significant treatment due to an abusive childhood and related psychological issues. Finally, the trial court afforded defense counsel the opportunity to supplement the record and counsel responded that the evidence was set forth in the memorandum.

Therefore, given the information in the probation reports and sentencing memorandum coupled with the trial court's invitation to provide additional evidence, defendant was given sufficient opportunity to make a record relevant to his eventual youth offender hearing and the request for a *Franklin* remand is denied. (*Woods*, *supra*, 19 Cal.App.5th at p. 1089.)

B. Sentence in Rape Case

Under section 1170.1, subdivision (a), the trial court selected one of the arson counts as the principal term and sentenced defendant to consecutive subordinate terms for the other arson and rape convictions, staying punishment for one rape count. For the rape convictions, the trial court imposed 20 month terms for each count although the punishment for rape in violation of section 261 is three, six or eight years. (§ 264.) Therefore, the trial court should have imposed two-year terms for each conviction (one-

third the midterm) with an aggregate sentence of 22 years, and not 21 years 8 months. (§ 1170.1, subd. (a).) The trial court is to prepare a new abstract of judgment with the proper aggregate sentence.

C. Excessive Value Sentencing Enhancement in Arson Case

Defendant was given a four-month consecutive sentence for the excessive-value enhancement in the arson case pursuant to section 12022.6, subdivision (a). (§ 12022.6, subd. (a) [enhanced sentencing for losses exceeding specified amounts "[w]hen any person . . . damages, or destroys any property in the commission . . . of a felony, with the intent to cause that . . . damage, or destruction"].) Section 12022.6, subdivision (f), provides that as of January 1, 2018, the enhancements would be repealed (i.e., would "sunset") unless the Legislature otherwise directed.

We hold that a certificate of probable cause is not required and that defendant did not waive his right to appeal the enhancement as a part of the plea agreement. However, the four-month sentence enhancement is affirmed because defendant is not entitled to be sentenced under the post-January 2018 version of section 12022.6.

1. A Certificate of Probable Cause Is Not Required

The People contend that defendant has waived his challenge to the section 12022.6 sentencing enhancement because he did not obtain a certificate of probable cause. (§ 1237.5.)

However, the requirement that defendant obtain a certificate of probable cause pertains to appellate claims that are, in substance, a challenge to the validity of the plea. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76; see Cal. Rules of Court, rule 8.304(b)(5) ["the reviewing court will not consider any issue affecting the validity of the plea" unless the defendant obtains a certificate of probable cause].) In the matter before us, defendant is not challenging the validity of his plea as it did not provide for a specific, agreed-upon sentence. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 53 (*Hurlic*)) ["as a general rule, a criminal defendant who enters a guilty or no contest plea *with an agreed-upon sentence* may challenge that sentence on appeal only if he or she first obtains a certificate of probable cause from the trial court." (italics added)].)

Rather, defendant's plea agreement provided that the trial court could impose a sentence at or below the agreed-upon maximum. Therefore, a certificate of probable cause is not required for defendant to appeal the sentencing enhancement on the basis of a change in the law. (See *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1016 ["a certificate of probable cause is not required to challenge the trial court's exercise of sentencing discretion where the plea agreement does not specify a particular sentence"].)

2. Waiver

The People contend that defendant has expressly waived his right to appeal the enhancement as a part of the plea agreement without citing any legal authority in support of their argument.

Defendant initialed and signed the plea agreement form, which states "I hereby give up my right to appeal from this conviction, including an appeal from the denial of any pretrial motions." At the October 3, 2016 hearing, the trial court questioned defendant to confirm that he understood that "because you are agreeing to enter into this plea, you will have to give up your right to appeal from this conviction . . . ."

"Appellate waivers contained within plea agreements are generally enforceable." (*People v. Becerra* (2019) 32 Cal.App.5th 178, 186.) However, a defendant cannot knowingly and intelligently waive the right to appeal unforeseen or unknown future error. (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815.) In *People v. Vargas* (1993) 13 Cal.App.4th 1653 (*Vargas*), the court found that defendant's general waiver of his right to appeal did not encompass the calculation of his conduct credits since those credits were not mentioned at the time his plea was entered. (*Id.* at pp. 1657–1661.) There, the court concluded that the record did "not support a knowing and intelligent waiver of defendant's right to appeal sentencing error occurring after a *general* waiver of the right to appeal." (*Id.* at p. 1663.)

Accordingly, we conclude defendant's general waiver did not include a waiver of his right to challenge the excessive-value enhancement under section 12022.6. (*Vargas*, *supra*, Cal.App.4th at p. 1662 ["The right of appeal should not be considered waived or abandoned except where the record clearly establishes it. [Citation]"].)

3. The Repeal of Section 12022.6 Does Not Apply Retroactively

Defendant argues that his four-month consecutive sentence imposed under section 12022.6 should be stricken because "the conduct for which he was punished is no longer punishable under the law" due to the statute's sunset clause. (§ 12022.6, subd. (f).)

The cases cited by defendant are completely inapplicable as they all involve changes in the law that made the *conduct* at issue no longer criminal before the judgment became final. (See *People v. Rossi* (1976) 18 Cal.3d 295, 298–299 [before lapse of time for appeal, statute criminalizing oral copulation between consenting adults was amended so as to legalize the defendant's conduct]; *People v. Collins* (1978) 21 Cal.3d 208, 211-212 [the act upon which defendant's guilty plea and conviction were based, nonforcible oral copulation, was no longer punishable before final judgment]; *Bell v. Maryland* (1964) 378 U.S. 226, 230 [defendants' conduct of entering a restaurant after being notified not to do so because of their race was no longer a crime before it had reached final disposition in highest court authorized to review it].) Here, in contrast, the change in the law leaves the underlying, substantive crime of destruction of property in effect, but repeals the enhanced sentencing. (See § 12022.6, subds. (a), (f).)

Defendant also relies on *In re Estrada* (1965) 63 Cal.2d 740, 747 (*Estrada*) for its holding that "[i]t is the rule at common law and in this state that when the old law in effect when the act is committed is repealed, and there is no savings clause, all prosecutions not reduced to final judgement are barred." However, the California Supreme Court has held *Estrada* inapplicable to a statute with a sunset clause. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1043 (*Pedro T.*).) There, the court determined that the planned repeal of a penalty provision in the Vehicle Code did not demonstrate a legislative intent to reduce punishment for all cases that were not yet final as of the repeal date. (*Id.* at pp. 1045–1050.) The court observed that "the very nature of a sunset clause, as an experiment in enhanced penalties, establishes – in the absence of evidence of a contrary legislative purpose – a legislative intent [that] the enhanced punishment apply to offenses committed throughout its effective period." (*Id.* at p. 1049.) The court concluded that the defendant was not entitled to the ameliorative effect of the reinstated

lesser punishment because, unlike in *Estrada*, the clear legislative intent was that those who committed crimes during the period of increased punishment were to receive the increase regardless of when their cases became final. (*Pedro T.*, *supra*, at pp. 1045–1046.) The court also considered the practical effect of a contrary rule, pointing out that "a rule that retroactively lessened the sentence imposed on an offender pursuant to a sunset clause would provide a motive for delay and manipulation in criminal proceedings." (*Id*. at pp. 1046–1047; see also *People v. Enlow* (1998) 64 Cal.App.4th 850, 858 [legislative intent that increased penalty apply to all crimes committed during period of increased penalties for auto theft].)

Defendant also relies on *People v. Nasalga* (1996) 12 Cal.4th 784, 787, in which the California Supreme Court held that defendant was entitled to the benefit of a 1992 amendment to section 12022.6 which increased the threshold loss requirement for his two year sentence enhancement. The 1992 amendment, which became operative after the defendant committed the crime but before final judgment, reduced the sentence enhancement for stealing $124,000 from two years to one year. However, *Nasalga* was decided before the Legislature enacted the 2007 amendments to section 12022.6, and does not address the effect of an operative sunset clause.

We conclude that the Legislature demonstrated its intent with sufficient clarity to show that the sunset clause contained in the 2007 amendments to section 12022.6 applies prospectively only and was not intended to apply retroactively to convictions occurring before it took effect on January 1, 2018. In the 2007 amendment process, the Legislature stated: "It is the intent of the Legislature that the amendments to [section 12022.6] apply prospectively only and shall not be interpreted to benefit any defendant who committed any crime or received any sentence before the effective date of this act." (Stats. 2007, ch. 420 § 2.) Further, we do not find evidence that the Legislature intended that the sunset clause in section 12022.6 should operate to strike punishment for offenses committed during its effective period. The purpose behind the sunset clause was to reexamine the threshold monetary amounts in section 12022.6, and not to reconsider whether the underlying conduct was punishable. The statute on its face specified that "[i]t is the

intent of the Legislature that the provisions of this section be reviewed . . . to consider the effects of inflation on the additional terms imposed." (§ 12022.6, subd. (f).) We also consider the practical effect of a contrary rule, which would arbitrarily remove punishment for defendants whose cases happened to be pending at the time of the planned repeal, prior to any reenactment of section 12022.6. (See *Pedro T., supra*, 8 Cal.4th at p. 1046.)

Thus, we conclude that the repeal of section 12022.6 does not apply retroactively and defendant's enhancement under that provision should not be stricken.

D. Penal Code Section 290.3 Fine in the Rape Case

As agreed to by both parties, the trial court's imposition of a $500 fine under section 290.3 was incorrect as it was based on both rape convictions despite the stay of one of the rape convictions pursuant to section 654. (§ 290.3, subd. (a); *People v. Sharret* (2011) 191 Cal.App.4th 859, 865 [punitive fines cannot be imposed on an offense for which punishment was stayed].) Therefore, the base fine should have been set at $300. In addition, the court should have imposed the mandatory penalty assessments in place at that time[7] and considered whether Alameda County elected to levy the penalty for emergency medical services under Government Code section 76000.5, subdivision (a)(1).[8] The parties agree that the matter should be remanded for a hearing to determine defendant's ability to pay as section 290.3, subdivision (a), provides that a fine shall be imposed "unless the court determines that the defendant does not have the ability to pay the fine." (See *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1250 (*Valenzuela*)

[7] The penalty assessments at the time of sentencing were: a 100 percent state penalty assessment (§ 1464, subd. (a)(1)); a 70 percent additional penalty (Gov. Code, § 76000, subd. (a)(1)); a 20 percent state surcharge (§ 1465.7); a state court construction penalty of up to 50 percent (Gov. Code, § 70372); a 10 percent additional DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); and a 40 percent additional state-only DNA penalty (Gov. Code, § 76104.7.)

[8] Respondent may raise this issue, the trial court's failure to impose mandatory penalty assessments and charges, for the first time on appeal. (*People v. Hamed* (2013) 221 Cal.App.4th 928, 941.)

[trial court ordered to conduct a hearing concerning defendant's ability to pay a section 290.3 fine "in light of his total financial obligations"].)

Therefore, this matter is remanded for a hearing regarding the mandatory penalty assessments, a determination of whether Alameda County has elected to levy the emergency medical services penalty, and a determination of defendant's ability to pay in light of his total financial obligations. (*Valenzuela*, *supra*, 172 Cal.App.4th at p. 1250.)

The trial court is to prepare a new abstract of judgment that details the amounts of and statutory bases for the base fine and each of the penalty assessments imposed. (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1459.)

E. Restitution Fund Fine in the Rape Case

The trial court imposed a restitution fund fine of $1,999.80 in the rape case, noting that it calculated the fine in its discretion and utilizing both counts as the basis. Specifically, the trial court stated that it was multiplying "the minimum fine by the number of years – here 3 years, 4 months, by the number of felony counts which arrives at the amount of $1,990.80." The trial court also noted that this amount was less than the $10,000 recommended by the probation department. The trial court was well within its right to use its discretion rather than a statutory formula so long as the sum falls within the range authorized by statute. (§ 1202.4(b)(2) [court may, not must, determine the fine using the formula]; *People v. Urbano* (2005) 128 Cal.App.4th 396, 405–406.)

Defendant argues that the trial court erred by using a conviction subject to a section 654 stay in calculating the restitution fund fine. However, defense counsel did not object to the restitution fund fine, thereby waiving the issue on appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 302–303.) Defendant's claim that the failure to object constitutes ineffective assistance of counsel is without merit both because counsel was silent as to his reasons for not objecting (*People v. Avena* (1996) 13 Cal.4th 394, 418 (*Avena*)) and because there is little to no probability that an objection would have resulted in a different fine given the trial court's careful exercise of its discretion. (*People v. Price* (1991) 1 Cal.4th 324, 387 [failure to raise an objection counsel reasonably believes is futile does not constitute ineffective assistance].) The trial court specifically noted that

it calculated the fine within its discretion and using the formula for both counts of the rape case and that the imposed fine amount was appropriate and fair.

Given that the court clearly made its own determination based on its discretion, it was not ineffective assistance to fail to object. (*People v. Le* (2006) 136 Cal.App.4th 925, 934–936 [ineffective assistance to fail to object when trial court relied solely on the statutory formula].) Finally, there is no basis for finding a reasonable probability that any objection by defense counsel would have resulted in the court imposing a different fine amount. (*Strickland*, *supra*, 466 U.S. at p. 694.)

F. Probation Investigation Fee in the Arson Case

Defendant concedes that this attorney did not object to the $250 probation investigation fee in the arson case. However, he raises an ineffective assistance of counsel argument because his attorney did not object to the fee on the basis that the trial court did not made a determination of his ability to pay the fee under the provisions of 1203.1b. (*People v. Trujillo* (2015) 60 Cal.4th 850, 860.)

Pursuant to section 1203.1b, subdivision (a), if the probation officer determines defendant is able to pay some portion of the cost of the presentence probation report, the probation officer shall inform the defendant of the right to a hearing regarding ability to pay. If the defendant does not waive the right to a hearing, the probation officer shall refer the matter to the court for scheduling of the hearing. (§ 1203.1b, subd. (b).)

In the arson case, the probation report states defendant "has been advised of the amount and of the right to have a hearing with counsel concerning his ability to pay." The probation report noted that defendant had no "verifiable income and [defendant] denied having any significant assets or debts," but also said that defendant reported earning approximately $500 per week from July 2014 until his arrest in the arson case and earning about $60 per day from September 2013 through March 2014.

Defense counsel did not object to the probation investigation fee. The record is silent as to why defense counsel did not object and we decline to speculate as to why he chose to remain silent. As reiterated by the Supreme Court in the *Avena* case, " 'In some cases, . . . the record on appeal sheds no light on why counsel acted or failed to act in the

manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, *these cases are affirmed on appeal.* [Citation.] Otherwise, appellate courts would become engaged "in the perilous process of second-guessing." [Citation.] Reversals would be ordered unnecessarily in cases where there were, in fact, good reasons for the aspect of counsel's representation under attack. Indeed, such reasons might lead a new defense counsel on retrial to do exactly what the original counsel did, making manifest the waste of judicial resources caused by reversal on an incomplete record.' " (*Avena*, *supra*, 13 Cal.4th at pp. 418–419.)

In supplemental briefing, defendant argues that *People v. Neal* (2018) 29 Cal.App.5th 820, provides us with an "additional ground" on which to strike the probation investigation fee. There, the court vacated a probation supervision fee under section 1203.1b and remanded the case to the trial court to for a determination of the defendant's ability to pay. (*Id.* at p. 829.) In contrast to this case, defense counsel objected to the imposition of the probation supervision fee of up to $75 per month during the sentencing hearing. (*Id.* at pp. 824–825.) Thus, *Neal* is inapposite to the facts of this case where defendant made no objection to the fee to the trial court.

We conclude that defendant's ineffective assistance of counsel claim on this claim is without merit. Thus, defendant has forfeited his challenge to the $250 probation investigation fee on the ground that the trial court did not follow the section 1203.1b provisions regarding a hearing on ability to pay by failing to object.

G. *Dueña*s Objections to Fines, Fees, and Assessments

In supplemental briefing citing to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), a case issued while the present appeal was pending, defendant asserts that the trial court violated his state and federal due process rights by imposing the fines, fees, and assessments in both the arson and rape cases[9] without first making findings as to his

[9] Defendant objects under *Dueñas* to all of the fines and assessments imposed by the trial court In the arson case, defendant was ordered to pay a $10,000 restitution fine (§ 1202.4, subd. (b)); a $240 court operations assessment (§ 1465.8); a $180 criminal

ability to pay. Defendant asks us to either vacate the trial court's imposition of the fines, fees, and assessments, or in the alternative, to remand the matter so that the trial court may consider evidence of his inability to pay. The People oppose these requests.

We decline to decide defendant's arguments based on *Dueñas*. We are remanding for resentencing on defendant's ability to pay the fine under section 290.3, as discussed in section V.D. Should he choose to do so, defendant may raise a *Dueñas* ability-to-pay objection during resentencing in regards to the totality of the fines, fees, and assessments.

H. Abstracts of Judgment

The court prepared two abstracts of judgment (one for the arson case, one for the rape case) when it should have prepared one abstract of judgment under the Determinate Sentencing Act, which requires that multiple consecutive terms be combined into a single aggregate term of imprisonment whether or not the consecutive terms arose from the same or different proceedings. (§ 1170.1(a)); Cal. Rules of Court, rule 4.452; see *In re Reeves* (2005) 35 Cal.4th 765, 772–773.) In addition, the abstract of judgment for the rape case does not reflect the sentence imposed for the second rape conviction, which was stayed. (*People v. Duff* (2010) 50 Cal.4th 787, 796 (*Duff*) [the sentence must be imposed but then stayed to avoid execution of the duplicative sentence].)

Further, defendant and the People agree that the revised abstract of judgment should omit the $250 probation investigation fee (section 1203.1b) listed in the abstract for the rape case because it was not part of the oral pronouncement of judgment. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*) ["[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgement it purports to digest or summarize"].) At sentencing, the trial court stated, "I am not imposing a probation

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conviction assessment (Gov. Code, § 70373); and a $250 probation investigation fee (§ 1203.1b.). In the rape case, defendant was ordered to pay a $1,999.80 restitution fine (§ 1202.4, subd. (b)), a $80 court operations assessment (§ 1465.8); a $60 criminal conviction assessment (Gov. Code § 70373); and a $500 sex offender fine (§ 290.3.)

investigation fee [in the rape case] inasmuch as the fee for investigation and preparation of this report was ordered [in the arson case] and given the multiple overlap in these cases, I am not imposing an investigation fee in this case." Accordingly, the new abstract of judgment should omit the $250 probation investigation fee (section 1203.1b) in the rape case.

The parties also agree that the $500 law enforcement fine under section 1202.5 included in the abstract of judgment in the rape case was not part of the oral pronouncement of judgment and therefore should be omitted from the abstract of judgment. The new abstract of judgment should omit the $500 section 1202.5 law enforcement fine. (See *Mitchell*, *supra*, 14 Cal.4th at p. 185.)

The trial court is ordered to prepare one abstract of judgment. That abstract shall include the sentence imposed for the second rape conviction, which was erroneously omitted, and that the sentence is stayed. (*Duff*, *supra*, 50 Cal.4th at p. 796.) The revised abstract of judgment should reflect the removal of the incorrect $250 probation investigation fee and the $500 law enforcement fine discussed above.

VI. DISPOSITION

The matter is remanded for resentencing in a manner that is consistent with the directions provided in part V of this opinion. The fine imposed in case number 177788 under section 290.3 is vacated and this case is remanded to the trial court for a new hearing on ability to pay the section 290.3 fine, and on the requisite mandatory penalty assessments and a possible levy of a medical emergency services assessment.

After resentencing, the trial court shall prepare a single abstract of judgment that reflects defendant's convictions in Alameda County Superior Court cases 177788 and 177809. For each of defendant's convictions for rape in case number 177788, the abstract of judgment will reflect the correct sentence of 2 years (one-third the midterm sentence) for each count to be consecutive to the sentence imposed in case number 177809. The sentence for one of the rape counts shall be stayed pursuant to section 654. The revised single abstract of judgment shall detail the amounts and statutory bases for the base fines and penalty assessments imposed, and shall omit the $250 probation

investigation fee (section 1203.1b) and the $500 law enforcement fine (section 1202.5) in the case number 177788. The clerk is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment in case number 177809 is affirmed. The judgment in case number 177788 is affirmed as modified by this disposition.

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Petrou, J.

We concur:

_____
Siggins, P.J.

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Fujisaki, J.